86-1168

No. .....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

—o—

AVIS SCHMIDT (Now MITCHELL),

Petitioner,

vs.

DAVID GREINER,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

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January 14, 1987

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QUESTION FOR REVIEW

Was the Defendant entitled to a qualified immunity as a matter of law where he discharged the Plaintiff from her civil service job in May of 1981 without giving Plaintiff a pre-termination hearing or any real pre-termination opportunity to present reasons why she should not be discharged?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

The petitioner Avis Schmidt respectfully prays that a writ of certiorari issue to review the decision of the Sixth Circuit Court of Appeals affirming the judgment and opinion of the Honorable Benjamin Gibson, United States District Judge for the Western District of Michigan.

—o—

* Avis Schmidt changed her name to Mitchell after these proceedings were started.

OPINION OF THE COURT BELOW

The Sixth Circuit Court of Appeals did not issue an opinion but affirmed the decision of the Honorable Benjamin F. Gibson, the United States District Judge. A copy of said Opinion is in the Appendix.

———o———

STATEMENT OF JURISDICTION

The decision of the Sixth Circuit Court of Appeals was filed on September 26, 1986. This Court's jurisdiction is involved under 28 USC Sec. 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC Sec. 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act or Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> (R.S. Section 1979; Dec. 29, 1979, P.L. 96-170, Section 1, 93 Stat. 1284.)

———o———

STATEMENT OF THE CASE

The Plaintiff's Complaint and Amended Complaint charged the Defendant with two (2) violations of her due process rights:

(1) Failure to provide Plaintiff, a career civil servant with a pre-termination hearing.

(2) The discharge of the Plaintiff without making a finding that she was guilty of a dischargeable offense under the Civil Service Rules which created her protected property right (the civil service job).

The District Court granted the Defendant's Motion for Summary Disposition on the basis of the Defendant's qualified immunity, while ruling that "the Defendant simply failed to show that as a matter of law, the steps he took gave Plaintiff a real opportunity to present reasons why she should not be discharged."

The Sixth Circuit Court of Appeals affirmed. The facts relied upon by the District Judge for dismissing this case without a trial were from a transcript and exhibits from a Michigan Civil Service hearing.

———o———

FACTS OF DISCHARGE

On Tuesday, May 12, 1981, Avis Schmidt (now Mitchell) had a pain in her left leg when she went to work. The pain became so intensive that she could not continue working so she went to a doctor at about 2:30 p.m.

Doctor Murray recommended that she should stay off the job. He also gave her a written statement to that effect. This slip was delivered to David Greiner personally

by Darian Graham, a friend of the Plaintiff, Avis Schmidt (now Mitchell).

This slip by Dr. Murray indicated that Plaintiff had been "medically advised to remain off of work until May 25, 1981." Along with this slip was a note from Plaintiff to David Greiner dated May 14, 1981 which reads as follows:

> "Dear David:
>
> I hope you enjoyed your seminar.
>
> Darian will give you the slip the Doctor signed. If you need more info let me know.
>
> I don't know what will be happening to my vacation — I'm sure with this pain a vacation won't be worthwhile.
>
> I'll be calling you. The keys to the desk and $2.00 for the refer-fund is in the last position of the roll-index.
>
> Thanks David.
>
> Avis."

Mr. Graham testified that when Greiner said he would need more information that Mr. Graham told him "that it would probably be up to the doctor whether he could give him any more information." This doctor's slip and handwritten letter from Avis Schmidt (now Mitchell) was delivered on Thursday, May 14, 1981.

The following day, Friday, May 15, 1981, David Greiner sent a letter to Plaintiff. This letter in effect demands a complete physician's statement by Monday, May 18, 1981 at 5:00 p.m. to include the following:

a) diagnosis;

b) prognosis for recovery;

c) expected date of confinement;

d) estimated date of return.

This most unreasonable demand was received by Plaintiff on Saturday, May 16, 1981 (a day most doctors are golfing, sailing, or otherwise occupied).

On Monday, the first day Plaintiff could do anything at all about this demand, she called Mr. Greiner. Mr. Greiner was not in and Plaintiff testified that she left a message with "Marian out in the lobby." She did not get a return call from Greiner.

The above testimony was uncontradicted.

Plaintiff further testified that her leg continued to be swollen and that she was suffering intense pain. ("It would feel like needles going through it and burning, and as it progressed up the leg where the swelling was, there was just an intense pain, and that pain would go as far as the groin.")

Plaintiff talked to her Union Representative, Diane Davis-Waller, and her attorney. She was extremely concerned since she could not comply with Greiner's demands in the allotted time.

Plaintiff testified that she had called Dr. Murray. Plaintiff testified that Dr. Murray said that if Mr. Greiner wanted to call him he would explain to him the situation. Plaintiff further testified that she was unable to comply with Greiner's request even after her call to the doctor.

Again, this testimony was never contradicted even though the Authority had over a month from one hearing date to another to prepare a reply.

Again, on Tuesday, May 19, 1981, Plaintiff called MSHDA in an attempt to reach Greiner. Plaintiff testified that she talked to Mary Platte, a secretary, that time and that Mary Platte was going to leave a message for Greiner. Plaintiff did not get a return call on May 19, 1981.

The above testimony again was never challenged, although the Authority had plenty of time to call Mary Platte.

Mr. Greiner went to a Seminar in Ann Arbor on May 20, 21 and 22nd, and was out of the office.

Plaintiff went back to the doctor on Wednesday, May 20, 1981. She did so "because the pain was going up the groin, to make sure that there wasn't further problems."

On Thursday, May 21, 1981, Mr. Greiner, who was out of town, caused to be sent to Plaintiff a mail-o-gram saying that her sick leave requests were disapproved and that she was to report to work Tuesday, May 26, 1981, at 8:00 a.m.

Plaintiff testified that she probably received this communication on Friday, May 22, 1981.

Diane Davis-Waller, the Union Representative, testified that Plaintiff had called her on Monday, May 18, 1981, saying that Plaintiff needed more information and that they wanted her to come in to a meeting on Tuesday morning, May 19, 1981. Plaintiff had told her that she had called the office (Greiner's) because she was too sick to make it on the following morning. Plaintiff asked her (Diane Davis-Waller) to call because she wanted someone else to call. Diane testified that she called Greiner's office

on May 18, 1981, and Greiner was not in. She also left a message with Marian (a secretary at MSHDA). This Union Representative was never given a return call by Mr. Greiner.

The Union Representative, Diane Davis-Waller, testified that she then got a call from Plaintiff saying that they (MSHDA) had denied her sick leave and that she was pretty upset about it. She testified that she called Mr. Greiner to try to see what was going on. She testified that this was on Friday, May 22, 1981. When she could not reach Greiner, she insisted upon talking to Valerie Thrasher (the Personnel Director). The Union Representative explained to Thrasher that Plaintiff had called her doctor and that Plaintiff had another appointment for the following Tuesday, May 26, 1981, (four (4) days from then) and that someone would be bringing in a medical statement. She testified that Ms. Thrasher wouldn't talk about it and got mad and hung up. She testified that since she wasn't going to be able to talk to anyone at MSHDA about it and try to settle it, that she would send a mail-o-gram with Plaintiff's position in it just to make sure there was some record. (This mail-o-gram was Grievant's Exhibit 9) Following is the test of that mail-o-gram:

> "This mailgram is a confirmation copy of the following message:
>
> 5173741000 MGM TDRN Lansing MI 214 05-22 0334P EST ZIP
>
> 5173741000 MGM TDRN Lansing MI 214 05-22 0334P EST ZIP
>
> Val Thrasher, Director of Personnel Plaza 1 Bldg. PO Box 30044 401 South Washington Square Lansing, MI 48909

> This is to confirm our abrupted conversation of May 22, 81. Avis Schmidt and myself both called Mr. Greiner on May 18, and left a message for him to call both parties, Mr. Greiner failed to do so. Ms. Schmidt has now received a mailgram saying that her annual leave request that was approved some weeks ago is now 'recinded' and that she is to report for duty on Tuesday May 26. Avis's doctor knew full well that she had time off approved and felt no need to extend her request for medical leave beyond May 25, 1981. However, at this time with the late change in leave approval it becomes necessary for her doctor to re-evaluate her ability to report to work. Ms. Schmidt phoned her doctor today May 22, 1981 and he is not able to examine her or make any statement on her expected date of return until Tuesday, May 26 at 9:30 a.m. Ms. Schmidt will see her doctor and send further documentation to you after her appointment. *Please phone me at 373-1000 if this does not meet with your approval.*" (Emphasis added).

The following Tuesday, May 26, 1981, Plaintiff testified she saw Dr. Murray who instructed his nurse to get an appointment with another doctor, and that the earliest they could get with the other doctor was Tuesday, June 9, 1981.

Plaintiff again had her friend Darian Graham take the doctor's slip directly to David Greiner. This doctor's statement stated as follows:

> "Medically advised to remain off work until she sees the vascular surgeon on Tuesday, June 9."
>
> Sincerely, Dr. Murray.
>
> June 9th date scheduled by doctor's secretary."

Mr. Graham testified that he delivered the above doctor's slip on May 26, 1981.

David Greiner, on the very same day he received the above doctor's slip proceeded to discharge Plaintiff by a letter dated May 26, 1981. With that letter was a copy of a form CS-301. The envelope was postmarked on May 27, 1981. This was received by Plaintiff on May 28, 1981.

The "Employee Departure Report" showed that Plaintiff still had 24.9 hours of sick time, 174 hours of annual leave, and 96 hours of deferred comp time to her credit. At the time of her discharge MSHDA owed Plaintiff Two Hundred Ninety-nine and three-tenths (299.3) total hours.

The doctor had told Plaintiff to have Mr. Greiner call him if he wanted more information. Plaintiff testified that she left a message that Greiner could call the doctor and she left the doctor's phone number with Marian, the receptionist, and Mary Platte for Mr. Greiner. *This testimony was never contradicted.*

Plaintiff testified that it was impossible for her to comply with Mr. Greiner's demand for a full written diagnosis, prognosis, expected date of confinement, and estimated date of return before her discharge on May 26, 1981.

Plaintiff testified that she did everything to keep everyone happy. She was very weak and in a lot of pain. She couldn't see how she could have done anything more.

She testified that she could not understand why he would terminate her when she had sick and annual leave. She had worked in Personnel and it had been the practice to pick-up annual leave when a person ran out of sick leave.

Plaintiff testified that she had left messages for Mr. Greiner to call her, but that he had not done so. She testi-

fied that because she couldn't keep awake in the afternoon that she had Diane Davis-Waller (the Union Representative) doing some of it for her in the week she was off.

Valerie Thrasher testified that she was the Personnel Director for MSHDA. She testified that when an employee called in and said they were sick, sick leave would be almost automatically granted. She testified that it would generally have been almost automatic to grant a sick leave such as Plaintiff was requesting and which Mr. Greiner denied. Following is her testimony:

> "Q. It would be approved? Now, suppose I called in and said or sent someone in with a slip from a doctor such as Joint Exhibit Number 1 and said the doctor said that—suppose the doctor said I was medically advised to be off work until May 25th, 1981? If you received that as a normal course, what would be the Michigan State Housing Development Authority's requirements or requests?
>
> A. I think that kind of a statement would meet all the requirement being it is dated May 12th and advises that the employee should be off from work until May 25th, which would be about a two week period. It would be approved.
>
> Q. And that approval would be almost automatic, wouldn't it?
>
> A. Almost."

Valerie Thrasher could think of only one other case in which the Authority had requested a full diagnosis, prognosis, et cetera, from an employee; that was in early 1980.

Ms. Thrasher further testified as follows:

> "Q. Would it surprise you if she did not, if she did not turn in a slip? Would it surprise you if there were

employees in the Michigan State Housing Development Authority that have been off a week and two weeks without turning in doctor's slips, and without being terminated in their employment? Would that surprise you?

A. It would not surprise me because for example if I were ill with the flu and were off for a week or two weeks, if my boss accepted my illness reason and the length of time that I had to be off, and I had sick leave to cover it, I would not be required to submit a doctor's statement.

Q. So a person could generally be off a couple of weeks without any sick leave without any doctor's statement if they were sick and their boss accepted that fact?

A. Yes.

Q. Now, it would be the usual practice as far as MSHDA is concerned and probably throughout Civil Service, isn't it? Have you worked in other places besides MSHDA?

A. Yes."

Ms. Thrasher testified that as a general rule sick leave for a short period of time would not require a written application. The case in which diagnosis, prognosis, et cetera, had been requested had involved a man who had been off for a lengthy period of time and formally requested a further lengthy leave of absence. In that case there would be a "documented leave of absence."

Plaintiff's situation was not one which would normally have required a "documented leave of absence."

Ms. Thrasher acknowledged that they had received Ms. Davis-Waller's mail-o-gram on or about the 22nd day of May.

Mr. Greiner acknowledged that he had Dr. Murray's slip (Grievant's Exhibit 1, Transcript, Volume II, p. 134; Appendix p. 164). He admitted that he had never written a doctor and requested a full diagnosis, prognosis for recovery, expected date of confinement, and estimated date of return. He admitted that he had no idea of what the costs of such a report would be, nor the circumstances under which a doctor would write such a report.

Mr. Greiner testified that he denied Plaintiff the use of sick leave from May 12, 1981. Mr. Greiner admitted that generally he had not denied sick leave where a person had called in and indicated that they were sick and in pain. As a matter of fact, Mr. Greiner gave the following testimony:

> "Q. (By Mr. Starr): As a matter of fact, can you name one other time where a person has been off and has submitted a medical statement from a doctor for the person who has been off, say, since May 12th, that you would have disapproved their sick leave? Can you give me one other instance?
>
> A. No."

Valerie Thrasher later gave the following testimony:

> "Q. Now I show you Joint Exhibit 4. It shows that the last day on the payroll was May the 12th, 1981, correct?
>
> A. Yes.
>
> Q. And did you sign this on May 26th, 1981?
>
> A. Yes, I did.
>
> Q. Did you check to see what the sick leave hours that the Grievant had remaining were at that time? Did you verify 24.9 hours?

A. Yes.

Q. So, in effect, what you have done is separated the Grievant as of May the 13th, that was departure date, and denied her sick leave even though she had delivered to the office and had delivered to the office on May 12th a slip from a Dr. Murray stating that she was medically advised to remain off work until May 25th?

A. That's correct.

Q. Are you aware of any other time during your — the time that you have been in personnel that a person has called in sick and hand delivered a doctor's statement that the doctor advised the employee to be off work and you have in effect terminated them and refused where there was a refusal to approve?

MR. GILBERT: Objection. Mr. Fitch, I believe she answered this question yesterday at the previous hearing.

MR. STARR: No, she did not.

HEARING OFFICER: No, not quite, not quite. But I believe you could phrase it more simply than that, Mr. Starr.

MR. STARR: Okay, all right.

Q. (By Mr. Starr, continuing): Do you know of any other time that sick leave has not been approved, that is, sick days have not been approved, paid sick, when the person has sick leave coming and they have delivered a statement from a doctor that they are medically advised to be off work?

A. Yes. I believe it happened when I worked for the Department of Social Services.

Q. But this has not happened while you were working with MSHDA, has it? In all the time that you have been working for MSHDA that has not happened, has it?

A. I don't believe it has. I don't recall."

Valerie Thrasher admitted that the requirement of a written diagnosis, prognosis, expected date of confinement and estimated date of return, had never been adopted by MSHDA or the Department of Commerce. She also admitted that in May of 1981, MSHDA was part of the Department of Commerce.

Mr. Greiner testified that Plaintiff made an effort to call him. He did not recall whether he returned the call, but on June 1, 1981, after the discharge on May 26, 1981, he recalls they had a conversation. They set up a meeting for June 3, 1981, at 11:00 a.m. Since Plaintiff wanted a Union Representative with her, Mr. Greiner refused to meet even then.

Plaintiff testified that in October of 1978 she had serious bladder surgery and was off until January, 1979. She testified as follows (Transcript, Volume III, p. 59; Appendix p. 89):

"Q. When was this?

A. October of 1978. But everyone was aware of the fact that I was going in, and that's why I didn't report to Mr. Greiner until January 1st. The bladder surgery was serious surgery, something I couldn't avoid. It was due to an accident.

Q. Were you involved in an automobile accident?

A. Yes, I was, in the parking lot.

Q. Now, have the absences that you have taken, sick time, have you actually been sick and under a doctor's care?

A. Yes, I have been. I had two breast surgeries. I never took a day at a time, like, a Friday or a Monday like State Employees get joked about. I never was in that practice. My father and mother used to

say if you can work, work. In fact, I got trouble because they wanted me to take workmen's comp when I was sitting in the parking lot with no keys in the vehicle. I can work in some pain and I did many, many times.

Q. Between May 12, 1981 and when you were discharged on the 26th were you in pain during that period of time?

A. Yes, I was, and I have been since on and off.

Q. But have you been physically able to work since that time?

A. Yes, I have. I could have gotten a doctor's release slip. When I wrote that one memo they are referring to, my intention was to leave it open that if he needed me he could say, "Okay. If you are not in too much pain would you mind coming in, you know, on your vacation time?" I have done that before. When I was scheduled something I would work."

Plaintiff testified regarding the standard operating procedure and practice of MSHDA. (Transcript, Volume III, p. 61; Appendix p. 91).

"Q. (By Mr. Starr, continuing): Avis, did you handle the functions of the personnel director for about 11 months?

A. Yes, I did, as a consultant.

Q. And were you aware, then, of the practice during the period the two-year period that you worked there in regard to sick leave or sick days?

A. Yes, I was.

Q. And what was that practice?

A. A very general rule, which to my knowledge the Department uses yet, is when you are off on sick leave and in my instance I had 24.9 hours, that if you

did not freeze that sick time it would automatically kick in your annual leave. The computer would take that annual leave as if it were sick leave. You can't do it in reverse, be on annual and automatically kick in on sick. It won't do that. But on sick leave the computer is set up that when it exhausts your sick leave unless the employee freezes that time it will take away your annual leave time."

The above testimony was uncontradicted although Valerie Thrasher, the present Personnel Director, was present.

Neither the letter of discharge nor the separation form claimed or indicated that the Petitioner was being discharged pursuant to Michigan Civil Service Rule 32.1 for:

1) Failure to carry out the duties and obligations imposed by the rules and by agency management.
2) Conduct unbecoming a state employee, or
3) Unsatisfactory service.

Rule 32.1 was the Michigan Civil Service rule permitting discharge of a state employee and providing the only grounds for such discharge.

———o———

REASONS FOR GRANTING THE WRIT

The District Judge, while finding that the Plaintiff had no real opportunity to present reasons why she should not be terminated prior to her discharge nonetheless held that the Defendant was entitled to a qualified immunity.

The Court of Appeals affirmed, adopting the opinion of the District Judge.

This District Court opinion seemed to be applying a combination subjective-objective test. The Plaintiff would urge this Court to clarify this area of the law by clearly adopting an objective test. If the Defendant violated a clearly established right of the Defendant the qualified immunity defense would not be available. Plaintiff would further urge this Court to rule that the Plaintiff's due process right to some real pre-termination opportunity to present reasons why she would not be terminated from her civil service job had been clearly established in May of 1981.

This Court by granting this Petition can clarify the law.

The Supreme Court of the United States in *Harlow v. Fitzgerald,* 457 US 800, 93 L. Ed. 2d 396, 102 S. Ct. 2727 (1982) appeared to establish an objective standard for determining whether an official is shielded from liability for violating constitutional rights of another under color of State Law. The question was whether the official's conduct violated "clearly established law."

Davis v. Scherer, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984) appeared to rule that it was clearly established in 1978 that some kind of a pre-termination hearing was required. See footnote 10 at p. 148. *Scherer* appeared to this writer to hold that the discharged employee in that case received ample pre-termination opportunity to respond. In the present case the Plaintiff had no pre-termination opportunity to present reasons why she should not be terminated as stated by the District Judge.

It appeared to this writer that *Davis vs. Sherer, supra,* would have been decided differently had the majority con-

cluded that Davis was given no real pre-termination opportunity to respond.

The District Court and the 6th Circuit Court of Appeals have ruled that a qualified immunity is available to the Defendant even though he discharged the plaintiff without giving her a pre-termination opportunity to present reasons why she should not be terminated.

Plaintiff contends her right to some form of a pre-termination opportunity to present reasons why she should not be terminated was clearly established in May of 1981. Therefore, under the objective test set forth in *Harlow v. Fitzgerald, supra,* Mr. Greiner's conduct violated "clearly established law" and he was therefore not entitled to a qualified immunity.

The District court opinion states as follows:

> Officials such as defendant Greiner " 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person, would have known'*. . . . Whether an official may prevail in his qualified immunity defense depends upon the '*objective reasonableness of* [*his*] *conduct as measured by reference to clearly established law.*' " *Davis v. Scherer,* 104 S.Ct. 3012, 3018 (1984) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982), citations and footnote omitted). (Emphasis added).

Plaintiff believes that if the law giving the Plaintiff a due process right to a pre-termination hearing or opportunity to present reasons why she should not be discharged was clearly established in May of 1981, then there should be no question about the "objective reasonableness of the defendant's conduct." The defendant must be presumed

to know the clearly established law and is not entitled to immunity.

This court's decision in *Davis v. Scherer, supra,* and *Harlow v. Fitzgerald, supra,* should be clarified.

———o———

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit Court of Appeals affirming the Honorable Benjamin Gibson, U.S. District Judge for the Western District of Michigan.

Dated: January 14, 1987

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APPENDIX

No. 85-1704

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed September 2, 1986)

AVIS SCHMIDT,

Plaintiff-Appellant,

vs.

DAVID GREINER,

Defendant-Appelle.

On Appeal from the United States District Court for the Western District of Michigan.

/

Before: KENNEDY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Avis Schmidt appeals from the judgment of the District Court granting David Greiner's Motion for Summary Judgment.

Upon consideration of the entire record and the briefs filed herein, we affirm the judgment of the District Court for the reasons stated by Judge Gibson in his Opinion filed July 22, 1985.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AVIS SCHMIDT,

Plaintiff,

v.

File No. G83-440 CA
JUDGMENT

DAVID GREINER,

Defendant.

(Filed July 22, 1985)

_____/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 22nd day of July, 1985.

PRESENT: HONORABLE BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated July 22, 1985, IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted and this case is hereby dismissed.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AVIS SCHMIDT,

Plaintiff,

v.

File No. G83-440 CA

DAVID GREINER,

OPINION

Defendant.

(Filed July 22, 1985)

---/

Plaintiff filed this civil rights action under 42 U.S.C. § 1983 after she was discharged from her position as an auditor with the Michigan State Housing Development Authority (MSHDA) for her failure to report for work after her request for leave due to illness was rejected. Plaintiff claims that defendant's conduct in discharging her deprived her of property without due process of law. Defendant's motion for summary judgment is now before the Court.

DISCUSSION

The motion for summary judgment is brought pursuant to Rule 56 of the Federal Rules of Civil Procedure which provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

To warrant the grant of summary judgment, the moving party bears the burden of establishing the non-exist-

ence of any genuine issue of fact that is material to a judgment in his favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 (1970); *United States v. Articles of Device . . . Diapulse*, 527 F.2d 1008, 1011 (6th Cir. 1976).

In determining whether or not there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained in the affidavits, attached exhibits, and depositions must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). Even if the basic facts are not disputed summary judgment may be inappropriate when contradictory inferences may be drawn from them. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *E.E.O.C. v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 189*, 427 F.2d 1091, 1093 (6th Cir. 1970).

Defendant argues that he is entitled to summary judgment on two grounds: first, that plaintiff was given sufficient notice of the charges against her to meet constitutional due process requirements; and second, that he is entitled to "good faith" immunity for his conduct because the exact nature of the pretermination hearing required in cases such as this had not been clearly established.

The record shows that plaintiff left work on Tuesday, May 12, 1981 to be examined by a doctor for pains in her legs. Apparently as a result of that visit, plaintiff was advised to remain off work until Monday, May 25, 1981. This medical recommendation was made in a note from

plaintiff's physician that was sent to defendant David Greiner with a letter by plaintiff dated May 14, 1981. On Friday, May 15th, defendant sent plaintiff a letter demanding that she supply by 5 p.m. on Monday, May 18, 1981 additional documentation of her medical problem including a diagnosis, prognosis for recovery, expected dates of confinement and estimated date of return. The letter also suggested that plaintiff meet with defendant on Tuesday, May 19th to discuss her request for leave and vacation schedule. Plaintiff received this letter on Saturday, May 16, 1981.

Plaintiff claims that she contacted her doctor on Monday, May 18th and he indicated that he would be happy to give defendant the requested information over the phone. Plaintiff also claims that she attempted to contact Mr. Greiner by phone on Monday, May 18th and again on Tuesday, May 19th, but he failed to return her calls. Defendant claims that he reecived no communication from plaintiff after May 14th and therefore sent her a mailgram on May 21, 1981 denying her request for leave and directing her to report for work on Tuesday, May 26, 1981 at 8 a.m. On May 26, 1981, plaintiff sent defendant a second note from her doctor which stated that she was advised to remain off work until she could be seen by vascular surgeons on Tuesday, June 9, 1981. However, she did not report for work on May 26th and defendant sent plaintiff a letter terminating her employment with MSHDA the same day.

That state employees who possess a property interest in their employment may not be discharged without some type of pretermination hearing has been clearly established for some time. *Cleveland Board of Education v.*

Loudermill, 105 S.Ct. 1487, 1493 (1985). In this case, it is not disputed that plaintiff, a tenured civil servant, could not be discharged from her position except for cause. As such, she had a property interest in her employment which is entitled to constitutional protection. *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694 (1972).

Though defendants were not required to provide plaintiff a full evidentiary hearing prior to terminating her employment, plaintiff was entitled to notice of the charges against her and defendants were required to give her an opportunity "to present reasons, either in person or in writing, why proposed action should not be taken. . . ." *Cleveland Board of Education v. Loudermill,* 105 S.Ct. 1495. Defendant contends that the series of letters he sent plaintiff satisfied these due process requirements. However, the present record does not support that contention. Defendant simply has failed to show that as a matter of law, the steps he took gave plaintiff a real opportunity to present reasons why she should not be terminated. Nevertheless, the Court concludes that defendant is entitled to "good faith" immunity for his conduct in this case.

Officials such as defendant Greiner " 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known' . . . . Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' " *Davis v. Scherer,* 104 S.Ct. 3012, 3018 (1984) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982), citations and footnote omitted). In

Davis, plaintiff-appellee Gregory Scherer was discharged from his position as a radio-teletype operator with the Florida Highway Patrol when he refused to resign his part-time job as a reserve deputy with the Escambia County Sheriff's Office. Although Scherer was originally granted permission by the Highway Patrol to accept the part-time position, he was subsequently notified that permission to work both jobs was revoked. Rather than complying with the Highway Patrol's directive that he resign his part-time job, Scherer communicated orally and in writing with his superiors explaining why he did not believe he should be required to give up the part-time work and continued working both jobs. Scherer was subsequently notified that he had been discharged from his position with the highway patrol. On review, the Supreme Court held that Scherer's employers were entitled to "good faith" immunity because it was not unreasonable for them to conclude that Scherer had been provided with the fundamentals of due process as a result of the series of communications between Scherer and the Florida Highway Patrol over his part-time employment. *Davis v. Scherer,* 104 S.Ct. 3018-3019.

A similar conclusion is warranted in this case. Taking all the evidence of record in a light most favorable to plaintiff, the Court concludes that it was not unreasonable for defendant to believe that the series of letters he exchanged with plaintiff were adequate to satisfy due process requirements. Those letters advised plaintiff that additional documentation was needed before her sick-leave request could be approved and invited plaintiff to meet with defendant on May 19th to discuss her vacation schedule and request for sick-leave. Plaintiff did not ac-

cept that invitation and, after being advised of the denial of her sick-leave request, did not report to work on May 26th as directed by defendant, nor did she appear to explain why she should not be required to report to work on that date. Because it was not clearly established by May, 1981 that plaintiff was entitled to greater pretermination due process protections than these, *see Davis v. Scherer*, 104 S.Ct. at n.10, defendant Griener is entitled to prevail on his "good faith" immunity defense.

For the foregoing reasons, the Court grants defendant's motion for summary judgment on plaintiff's damage claim based on defendant's qualified "good faith" immunity defense. Since plaintiff does not seek any relief from defendant except damages, having previously won reinstatement to her position without back-pay as a result of her administrative challenge to her discharge, this action is dismissed.

Dated: July 22, 1985.

/s/ BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

AVIS SCHMIDT,

Plaintiff,

vs.

DAVID GREINER,

Defendant.

File No.
G 83 440 CA(5)

JUDGE
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SECOND AMENDED COMPLAINT

Plaintiff, Avis Schmidt, by her attorney, H. James Starr, files her Amended Complaint herein as a matter of course, alleging as follows:

1. This is an action to enforce civil and constitutional rights pursuant to 42 USC § 1983, the Rehabilitation, Comprehensive Services and Development Disabilities Act of 1978.

2. The Plaintiff is an individual residing in Lansing, Michigan.

3. The Defendant is an individual employed by the Michigan State Housing and Development Authority (MSHDA), a bureau of the State of Michigan, Department of Commerce.

4. At all times pertinent to this case Defendant was Deputy Director of Finance and immediate supervisor of Plaintiff.

5. Jurisdiction is invoked pursuant to 28 USC § 1343(3) and (4).

6. As an employee of the State of Michigan, Plaintiff was a classified civil servant and therefore was in the protection of the Rules of the Civil Service Commission of the State of Michigan. She, therefore, had a legitimate expectation of continued employment with the State of Michigan.

7. Prior to and at the time of her discharge, Plaintiff was subjected to an intentional, malicious, systematic and continuous course of harassment by the Defendant while the Defendant was acting in his official capacity as an agent of the State of Michigan.

8. The conduct described in Paragraph 7 had the purpose and effect of unreasonably interfering with her work performance and created an intimidating, hostile and offensive work environment.

9. On May 26, 1981, Plaintiff was unlawfully, arbitrarily and unconstitutionally discharged from her employment by the Defendant retroactive to May 12, 1981.

10. The Defendant alleged that Plaintiff's discharge was based on a denial of sick leave of absence.

11. Plaintiff never suggested a sick leave of absence. Defendant requested routine sick leave of two and one-half weeks based on the written advice of a physician.

12. At the time of Plaintiff's discharge she had been employed by the State of Michigan for approximately ten years, and had accrued 24.9 hours of sick leave and 174 hours of annual leave.

13. The Defendant, contrary to Civil Service Rules and established MSHDA policy and course of business, unilaterally and without authority classified Plaintiff's request for sick time as a request for a sick leave of absence and discharged her.

14. The actions of the Defendant were carried out in bad faith and without justification, excuse or under any cloak of immunity.

15. A Civil Service Hearing Officer ruled that Defendant's actions were a violation of the rules and ordered Plaintiff reinstated with full back pay. He imposed a mandatory three-month medical leave of absence.

16. The Michigan State Housing Development Authority made application for Leave to Appeal to the Employment Relations Board of the decision, and Plaintiff applied for Leave to Appeal the imposition of the mandatory three-month medical leave of absence.

17. The Employment Relations Board denied both requests and the Civil Service Commission affirmed the Hearing Officer's decision.

18. The Michigan Housing Development Authority did not appeal from the final Civil Service Commisison decision.

19. Plaintiff appealed the portion of the decision imposing the mandatory three-month medical leave of absence to the Ingham County Circuit Court.

20. The Ingham County Circuit Court has ruled that plaintiff should not be subjected to the mandatory three-month medical leave of absence and overruled The Civil Service Commission decision.

21. Plaintiff was not given notice or a pretermination hearing of any kind and this omission deprived Plaintiff of her property without due process of law, in violation of the Constitution of the United States, Amendment 14, and 42 USC 1983.

22. Plaintiff's due process rights were also violated when Defendant discharged Plaintiff in contradiction to the Rules of the Civil Service Commission, to-wit:

23. Under the rules of the Michigan Civil Service Commisison, an employee in the State Civil Service may only be dismissed for the reasons set forth in Rule No. 32.1:

1) Failure to carry out the duties and obligations imposed by the rules and by agency management,

2) Conduct unbecoming a state employee, or

3) Unsatisfactory service.

24. At no time during the course of her employment or during the administrative proceedings subsequent to Plaintiff's dismissal did the Defendant even allege that Plaintiff committed any of the aforementioned acts.

25. Defendant acted intentionally and with willful and reckless disregard for the rights and sensibilities of Plaintiff.

26. As a direct and proximate result of the unlawful employment practices, violations of law and deprivations of Constitutional rights by the Defendant, described above, Plaintiff has sustained the damages.

27. As a proximate result the unlawful, unconstitutional, intentional and malicious actions of the Defendant, Plaintiff has suffered lost wages and benefits. Additionally, due to Defendant's discriminatory and harassing practices Plaintiff has suffered depression, mental anguish, emotional distress, humiliation, embarrassment, outrage, loss of professional standing and status, and loss of capacity for enjoyment of life. Plaintiff has also been forced to retain counsel and pay attorney fees to vindicate her rights in numerous administrative proceedings and in the courts of the State of Michigan and the United States.

RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendant for lost wages, benefits, mental and emotional suffering, attorney's fees in getting her job back and back pay.

Plaintiff further prays that this Court award exemplary and punitive damages against Defendant.

Plaintiff further prays for costs and attorney fees as provided by law.

Dated: July 22, 1985.

/s/ H. JAMES STARR (P20915)
Attorney for Plaintiff

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1168

In The
SUPREME COURT
OF THE UNITED STATES

October Term, 1986

AVIS SCHMIDT,

Petitioner,

v

DAVID GREINER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the question implies that Petitioner did not receive any form of pre-termination due process which Respondent believes is contrary to the opinion of the court below. Accordingly, Respondent would restate the question as follows:

WAS THE RESPONDENT'S QUALIFIED "GOOD FAITH" IMMUNITY DEFENSE PROPERLY UPHELD BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS WHERE GREATER PRE-TERMINATION HEARING RIGHTS THAN THOSE RECEIVED BY THE PETITIONER WERE NOT CLEARLY ESTABLISHED BY MAY, 1981 WHEN PETITIONER WAS DISCHARGED?

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v

DAVID GREINER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

BRIEF OF RESPONDENT IN OPPOSITION

Respondent, David Greiner, prays that this Court will deny the writ of certiorari sought by Petitioner, Avis Schmidt.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, filed September 26, 1986, appears at page App. 1 of the Appendix to the petition filed by Petitioner. The judgment and opinion of the United States District Court, Western District of Michigan, filed July 22, 1985, appear at pages App. 2 and 3, respectively, of the Appendix to the petition for writ of certiorari.

JURISDICTION

Respondent agrees with Petitioner's assertion that jurisdiction in this matter is controlled by 28 USC 1254(1). As is discussed more fully in our argument, however, Respondent contends that this Court should decline to exercise said jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent agrees with the statement of constitutional and statutory provisions as set forth at page 2 of the petition for certiorari filed by Petitioner.

STATEMENT OF THE CASE

Petitioner was an employee of the Michigan State Housing Development Authority (hereinafter "Housing Authority"), an agency of the State of Michigan within the Department of Commerce. Petitioner was separated from her employment with the Housing Authority on May 26, 1981, effective May 12, 1981. Stemming from said separation the Petitioner filed three actions. First, a post-termination grievance proceeding was held before the Michigan Department of Civil Service with an appeal of part of the Civil Service decision to the Ingham County Circuit Court, which resulted in Petitioner being reinstated to her position with the Housing Authority and awarded full back pay and benefits. Second, an action was filed in the Michigan Court of Claims against the Housing Authority for interest on the back pay award and attorney fees for the Civil Service hearing; Petitioner dismissed this action. Third, Petitioner filed the present action in the United States District Court, Western District of Michigan, against her immediate supervisor, David Greiner (hereinafter "Respondent"), seeking damages based upon 42

USC 1983, claiming that Respondent failed to give her notice or a pre-termination hearing of any kind, and that said omission deprived Petitioner of her property (employment) without due process.

On April 30, 1985, Respondent filed a motion for summary judgment, setting forth two arguments; first, that Petitioner was given notice and an opportunity to respond prior to separation sufficient to satisfy pre-termination due process requirements, and second, that the Respondent is immune from suit under the doctrine of qualified "good faith" immunity.

On July 22, 1985, the District Court filed an opinion and order granting Respondent's motion for summary judgment based upon the second contention that Respondent was entitled to a "good faith" immunity defense, relying principally upon the Court's finding in *Davis* v *Scherer*, 468 US 183; 104 S Ct 3012; 82 L Ed 2d 139 (1984).

On August 16, 1985, Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. On September 2, 1986, after reviewing the record, briefs and hearing oral argument, the Court of Appeals in a *per curiam* opinion affirmed the judgment for the reasons set forth in the District Court's opinion.

COUNTERSTATEMENT OF FACTS

It is Respondent's belief that the statement of facts as set forth by Petitioner contains numerous items that are not relevant to the issue to be considered by this Court; therefore, Respondent offers this Counterstatement of Facts.

During the afternoon of May 12, 1981, Petitioner left her place of employment with the Housing Authority for a

doctor's appointment and did not return. On May 14, 1981, Petitioner had delivered to her immediate supervisor, Respondent, a doctor's slip dated May 12, 1981, and a note dated May 14, 1981, stating that for medical reasons she would be off work until May 25, 1981, a period of two weeks. Petitioner had also previously scheduled a three-week vacation which was to begin on May 26, 1981, and end on June 15, 1981. Thereby Petitioner would be off work a total of five consecutive weeks. At the time Petitioner left work on May 12, 1981, she had only 24.9 hours of accrued sick leave available for her use, enough for approximately three days of sick leave; yet Petitioner requested two and one-half weeks of sick leave.

On May 15, 1981, Respondent sent Petitioner a letter stating: (1) that he needed certain required medical information before he could make a decision regarding her leave; (2) that the state of her health was having an effect on her ability to function satisfactorily in her position; and (3) that they should discuss these matters on the morning of May 19,1981.

Petitioner failed to provide the necessary medical information and also failed to discuss the matters concerning her absence with Respondent, or even to contact him on May 19, 1981. Petitioner contends she contacted the Housing Authority on May 18 and 19, 1981, and left messages with two other employees of the Housing Authority for Respondent to call her. Respondent contends he did not receive a phone message from Petitioner.

On May 21, 1981, after not receiving any further explanation from Petitioner as to her absence since her note of May 14, 1981, and after she had been off work for over a week without an approved leave or accumulated sick leave hours sufficient to cover the time period, Respondent sent a mailgram to Petitioner stating that her sick leave request

was disapproved, her previously approved annual leave was rescinded, and that she should report to work on May 26, 1981, at 8:00 a.m.

Petitioner failed to report to work on May 26, 1981; instead, she had delivered another doctor's slip which did not contain any of the requested medical information.

Failing to receive any substantive information on Petitioner's illness and Petitioner's failure to discuss the problem or to come to work as directed, Respondent consulted with the Personnel Department and the then-Executive Director of the Housing Authority as to what course of action to take. Upon obtaining their concurrence, Respondent, on May 26, 1981, sent a certified letter with attachments to Petitioner stating: (1) that her many health problems and resulting illness leaves of absence had had a detrimental effect on the functioning of the Audit Unit; and (2) as a result, the Housing Authority could no longer approve any additional illness leaves of absence, and therefore she would be separated based upon leave of absence denied.

Petitioner filed a grievance on her separation against the Housing Authority, pursuant to the post-termination civil service grievance procedure established by the Michigan Department of Civil Service. The grievance was processed through a full evidentiary hearing and an appeal before the Ingham County Circuit Court, with the result that Petitioner was reinstated to her position with the Housing Authority on June 1, 1982 and awarded full back pay and benefits.

REASONS FOR DENYING THE WRIT

Petitioner has asserted that this Court should grant a writ of certiorari in this case because this Court's decisions in

Davis v *Scherer, supra*, and *Harlow* v *Fitzgerald*, 457 US 800: 102 S Ct 2727; 73 L Ed 2d 396 (1982) need to be clarified. Petitioner is arguing in essence that, because the decisions in the above cases are unclear, the District Court and the Court of Appeals in the present matter misapplied the holdings set forth therein to the detriment of Petitioner. These assertions by Petitioner, we contend, simply are not correct.

I.

THE DECISION BY THE DISTRICT COURT AS AFFIRMED BY THE COURT OF APPEALS IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The District Court relied principally on the holding in *Davis* in deciding that Respondent was entitled to a "good faith" immunity defense. The factual situation in *Davis* is very similar to the factual situation in the present case. In *Davis*, Plaintiff Scherer was discharged from his position with the Florida Highway Patrol when he refused to resign his part-time employment as a reserve deputy with a county sheriff's office. When Scherer refused to resign, a series of oral discussions and an exchange of letters between Scherer and his superiors ensued concerning the various parties' reasons why Scherer should or should not resign his part-time employment. Scherer was subsequently notified that he had been discharged from his position with the Florida Highway Patrol.

This Court held that Scherer's superiors were entitled to "good faith" immunity because it was not unreasonable for them to conclude that Scherer had been provided with the fundamentals of due process as a result of the series of communications which informed him of their objection to his part-time employment and provided him several opportunities to respond. *Davis, supra*, 468 US at 192.

The District Court properly determined that a similar conclusion was warranted in the present case:

> "*Taking all the evidence of record in a light most favorable to plaintiff, the Court concludes that it was not unreasonable for defendant to believe that the series of letters he exchanged with plaintiff were adequate to satisfy due process requirements.* Those letters advised plaintiff that additional documentation was needed before her sick-leave request could be approved and invited plaintiff to meet with defendant on May 19th to discuss her vacation schedule and request for sick-leave. Plaintiff did not accept that invitation and, after being advised of the denial of her sick-leave request, did not report to work on May 26th as directed by defendant, nor did she appear to explain why she should not be required to report to work on that date. Because it was not clearly established by May, 1981 that plaintiff was entitled to greater pretermination due process protections than these, *see Davis v. Scherer*, 104 S.Ct. at n.10, defendant Griener [sic] is entitled to prevail on his 'good faith' immunity defense." [Judge Gibson's opinion of July 22, 1985. See Petitioner's Appendix, pp App. 7 and 8.] (Emphasis supplied.)

Petitioner attempts to draw a distinction between *Davis* and the present case by stating that this Court in *Davis* found that Scherer had a real opportunity to be heard, while the District Court in the present case determined that Petitioner had no real opportunity to present reasons why she should not be terminated. [See petition for writ of certiorari, p 17.]

It is difficult to see Petitioner's distinction in that a review of the facts of both cases indicates that neither Scherer nor Petitioner herein were on notice that their

conduct would lead to their terminations prior to the actual notice of said terminations and, therefore, neither had an opportunity to present reasons why they should not be terminated. What the courts did determine, however, was that both Scherer and Petitioner herein were aware of the issues that led to their terminations and, in fact, were both requested and given an opportunity to respond to their superiors thereon.

Based upon the objective reasonableness of the superiors' conduct as determined by the courts in *Davis* and the present case, i.e., the discussions and correspondence between the parties on the underlying issues that caused the terminations, coupled with the lack of clearly established law that Scherer or Petitioner were entitled to greater pre-determination due process protections at the time of their discharge than was afforded them, the courts determined that Scherer's employers and Respondent herein were, nevertheless, properly entitled to prevail on a "good faith" immunity defense.

While Petitioner urges this Court only to clarify its decision in *Davis*, Respondent suggests that Petitioner is actually seeking a reversal of said decision. Petitioner argues that since her right to some form of a pre-termination opportunity to present reasons why she should not be terminated were clearly established in May, 1981, the Respondent's conduct violated "clearly established law" and he was therefore not entitled to a qualified immunity. [See petition for writ of certiorari, p 18.] On the contrary, such alleged pre-termination rights were not clearly established at the time of Petitioner's discharge in May, 1981, as evidenced by the inability of the Fifth Circuit Court of Appeals in *Davis* and a U.S. District Court within the Sixth Circuit in *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985), to come to that conclusion. This contention will be more fully discussed in our second argument.

Accordingingly, we contend the decision of the District Court as affirmed by the Court of Appeals is entirely consistent with the decision reached by this Court in the *Davis* case.

II.

THE REQUIREMENT THAT PRE-TERMINATION HEARINGS WERE REQUIRED PRIOR TO DISMISSAL WAS NOT CLEARLY ESTABLISHED WITHIN THE SIXTH CIRCUIT AT THE TIME OF PETITIONER'S TERMINATION.

In addition to the above reasons for denying the writ, a futher reason, not specifically addressed by the District Court, is that the requirement of pre-termination hearings was not clearly established within the Sixth Circuit in May, 1981.

The fact that the law was unsettled may be demonstrated by comparing this case with *Cleveland Bd of Educ* v *Loudermill, supra*, especially the decision at the District Court level, *Loudermill* v *Cleveland Bd of Educ*, 721 F2d 550 (6th Cir, 1983). The *Loudermill* case presented facts very similar to the alleged facts in the present case; both plaintiffs were classified civil servants. The time frame of events is also very similar; the discharge of Loudermill occurred in November, 1980, just six months prior to the separation of Petitioner herein.

The United States District Court for the Northern District of Ohio dismissed Loudermill's 42 USC 1983 action for failure to state a claim upon which relief could be granted, holding that while Loudermill enjoyed a cognizable property interest in continuing employment, due process did not require a pre-termination hearing. (see *Loudermill*, 721 F2d 550, 553.)

Although the district court's holding was subsequently overturned by the Sixth Circuit Court of Appeals and affirmed by this Court, it is obvious that it was not clearly established within the Sixth Circuit prior thereto that pre-termination hearings are required for due process purposes. This is especially true considering that when a United States District Court within the Sixth Circuit, where the present case also arises, although requested to rule on the question, could not come to the conclusion that pre-termination hearings were required.

Further, under the standard set forth in *Harlow*, *supra*, for determining whether an official is entitled to a grant of immunity, namely, whether the official's conduct at the time it was undertaken violated "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, *supra*, 457 US at 818, it would be difficult to conclude that it was reasonable for Respondent herein, an intermediate supervisor untrained in the law, to be required to know that pre-termination hearings were required prior to separation of a classified civil servant, when a United States District Court, after reviewing the available law on the subject, could not come to that conclusion. Accordingly, we contend that the requirement of pre-termination hearings was not clearly established or could not reasonably have been known by Respondent at the time of Petitioner's termination in May of 1981, and thus Respondent is entitled to prevail on a good faith immunity defense.

CONCLUSIONS AND RELIEF SOUGHT

Wherefore, Respondent respectfully prays that this Court will deny certiorari.

Respectfully submitted,
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